

(2) Such person is required to furnish information solely by reason of attribution of stock ownership from a non-resident alien(s) under paragraph (c) of this section.

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§ 1.6038-3 Information returns required of certain United States persons with respect to controlled foreign partnerships (CFPs).

(a) *Persons required to make return*—(1) *Controlling fifty-percent partners.* The term *controlling fifty-percent partner* means a United States person that controlled (as defined in paragraph (b)(1) of this section) the foreign partnership at any time during the partnership's tax year (as defined in paragraph (b)(8) of this section). Except as provided in paragraph (c), (d), or (e) of this section, for each tax year of a foreign partnership during which the partnership has one or more controlling fifty-percent partners, each controlling fifty-percent partner must complete and file Form 8865, "Return of U.S. Persons With Respect To Certain Foreign Partnerships," containing the information described in paragraph (g) of this section.

(2) *Controlling ten-percent partners.* If at any point during a foreign partnership's tax year (as defined in paragraph (b)(8) of this section) a United States person owned a ten-percent or greater interest in the partnership while the partnership was controlled by United States persons owning ten-percent or greater interests, such United States person is a controlling ten-percent partner. See paragraph (b)(1) of this section for the definition of control. However, a United States person is not a controlling ten-percent partner with respect to a particular foreign partnership for a particular tax year of the foreign partnership if at any point during that year the partnership had a controlling fifty-percent partner, as defined in paragraph (a)(1) of this section. Except as provided in paragraph (c), (d), or (e) of this section, for each tax year of a partnership during which the partnership has controlling ten-percent partners, each controlling ten-percent partner must complete and file Form

8865 containing the information described in paragraph (g)(1) of this section.

(3) *Separate returns for each partnership.* A United States person required to report under this paragraph (a) must file a separate Form 8865 for each foreign partnership with respect to which the person is a controlling fifty-percent partner or a controlling ten-percent partner.

(b) *Ownership determinations and definitions*—(1) *Control.* Control of a foreign partnership is ownership of more than a fifty-percent interest in the partnership.

(2) *Fifty-percent interest.* A fifty-percent interest in a partnership is an interest equal to fifty percent of the capital interest in such partnership, an interest equal to fifty percent of the profits interest in such partnership, or an interest to which fifty percent of the deductions or losses of such partnership are allocated.

(3) *Ten-percent interest.* A ten-percent interest in a partnership is an interest equal to ten percent of the capital interest in such partnership, an interest equal to ten percent of the profits interest in such partnership, or an interest to which ten percent of the deductions or losses of such partnership are allocated.

(4) *Constructive ownership rules.* For purposes of determining an interest in a partnership, the constructive ownership rules of section 267(c) (other than section 267(c)(3)) apply, taking into account that such rules refer to corporations and not to partnerships. However, an interest will be attributed from a nonresident alien under the family attribution rules of section 267(c)(2) and (4) only if the person to whom the interest is attributed owns a direct or indirect (under the rules of 267(c)(1) or (5)) interest in the foreign partnership.

(5) *Determination of amount of interest.* Whether a person owns a fifty-percent interest, or a ten-percent interest, as described in paragraphs (b)(2) and (3) of this section, is determined for each tax year of the foreign partnership by reference to the agreement of the partners relating to such interests during that tax year.

(6) *Definition of United States person.* The term *United States person* is defined in section 7701(a)(30).

(7) *Definition of a foreign partnership.* A foreign partnership is a partnership described in section 7701(a)(5).

(8) *Tax year of a foreign partnership.* The tax year of a foreign partnership is determined under section 706.

(9) *Examples.* The rules of paragraph (a) of this section and this paragraph (b) are illustrated by the following examples:

Example 1. Sole U.S. partner does not own more than a fifty-percent interest. No United States person owns any interest (directly or constructively) in *FPS*, a foreign partnership whose tax year under section 706 is the calendar year. On January 1, 2001, *US*, a United States person with the calendar year as its tax year, contributes property to *FPS* in exchange for a 40% interest in a section 721 transaction. No United States persons acquire directly or constructively any other interests in *FPS* during *FPS*'s 2001 tax year. *US* is not a controlling fifty-percent partner during *FPS*'s 2001 tax year. *US* did not own during that tax year, either directly or constructively, more than a 50% interest in the partnership under paragraphs (b)(2) and (4) of this section. Also, *US* is not a controlling ten-percent partner; although *US* owned a 10% or greater interest, *US* persons owning at least 10% interests did not control *FPS*. Therefore, *US* does not have to file with its 2001 income tax return a Form 8865 with respect to *FPS* under section 6038. (But see section 6038B for the reporting obligations of *US* with respect to its transfer of property to *FPS* and section 6046A for the reporting obligation of *US* with respect to its acquisition of an interest in *FPS*. See also § 1.6046A-1(e)(1) regarding the overlap between sections 6038B and 6046A).

Example 2. Controlling ten-percent partners. Assume the same facts as in *Example 1*. In addition, on January 1, 2002, *USI*, a United States person unrelated to *US* and a calendar year taxpayer, purchases a 15% interest in *FPS* from a foreign partner of *FPS*. Neither *US* nor *USI* is a controlling fifty-percent partner during *FPS*'s 2002 tax year because neither one owns more than a 50% percent interest in *FPS* during that year. However, *US* and *USI* are controlling ten-percent partners for that year because each owns at least a 10% interest (*US* owns a 40% interest and *USI* owns a 15% interest) and together they control *FPS* because collectively they own more than a 50% interest in *FPS*. As controlling ten-percent partners, under section 6038, each is required to file a Form 8865 with its 2002 income tax return. (*USI* must also report its acquisition of the 15% interest in

FPS under section 6046A on its Form 8865 filed with its 2002 income tax return.)

Example 3. Constructive ownership rules. Assume the same facts as in *Example 2*. In addition, on January 1, 2003, *US2*, a United States person and the brother of *US*, purchases 50% of the stock of *FC*, a foreign corporation. *FC* owns a 20% interest in *FPS*. Thus, under sections 6038(e)(3) and 267(c)(1), *US2* indirectly owns a 10% interest in *FPS* (10% is *US2*'s proportionate share of *FC*'s 20% interest in *FPS*), and under sections 6038(e)(3) and 267(c)(2), *US2* is attributed *US*'s 40% interest. Additionally, *US* directly owns a 40% interest in *FPS* and is attributed *US2*'s 10% interest pursuant to section 6038(e)(3) and section 267(c)(2). Therefore, *US2* is considered to own a 50% interest (10% indirectly and 40% from *US*) in *FPS*, and *US* is considered to own a 50% interest in *FPS* (40% directly and 10% from *US2*). *FPS* has no controlling fifty-percent partners, because neither *US*, *USI*, nor *US2*, owns a greater than 50% interest. However, *US*, *USI*, and *US2* are each controlling ten-percent partners and each must file Form 8865 pursuant to section 6038 for *FPS*'s 2003 tax year ending December 31, 2003. Each must attach Form 8865 to its tax return for its 2003 tax year.

Example 4. Controlling fifty-percent partners. Assume the same facts as in *Example 3*. In addition, on June 1, 2004, *US* acquires an additional 1% direct interest in *FPS*. *US* is now a controlling fifty-percent partner of *FPS*, because *US* owns a 41% interest directly and a 10% interest constructively from *US2*. *US2* is also a controlling fifty-percent partner, because *US2* owns 10% indirectly and 41% constructively from *US*. Both *US* and *US2* are required to file Form 8865 containing all the information required to be submitted by controlling fifty-percent partners. (But see paragraph (c)(1) of this section, which contains filing exceptions when there are multiple controlling fifty-percent partners). *USI* is no longer a controlling ten-percent partner because *FPS* now has at least one controlling fifty-percent partner, and *USI* does not qualify as a controlling fifty-percent partner. Therefore, *USI* is not required to file Form 8865 under section 6038.

Example 5. Constructive ownership from a nonresident alien. *US*, a United States person, does not own directly or constructively an interest in *FPS*, a foreign partnership. The tax year of *FPS* is the calendar year. *NRA*, a nonresident alien, is the mother of *US*. In 2002, *NRA* acquires a 55% interest in *FPS*. Because *US* owns neither a direct nor a constructive interest in *FPS* under sections 6038(e)(3) and 267(c)(1) or (5), *NRA*'s interest is not attributed to *US* under sections 6038(e)(3) and 267(c)(2). If in 2003 *NRA* becomes a United States person, *NRA*'s interest will be attributed to *US*. However, *US* is excused from filing Form 8865 if *US* satisfies the requirements of the constructive owners exception

in paragraph (c)(2) of this section. In 2003, *NRA* is a controlling fifty-percent partner and must file a Form 8865 under section 6038 for *FPS*'s 2003 tax year.

(c) *Exceptions when more than one United States person is required to file Form 8865 pursuant to section 6038*—(1) *Multiple controlling fifty-percent partners*—(i) *In general.* If, with respect to the same foreign partnership for the same tax year, more than one United States person is a controlling fifty-percent partner, then in lieu of each controlling fifty-percent partner filing a separate Form 8865, only one Form 8865 from one of the controlling fifty-percent partners is required, provided all of the requirements of paragraph (c)(1)(ii) of this section are satisfied. A person that is a controlling fifty-percent partner solely because of an interest to which deductions or losses are allocated may file the single return only if there is no United States person that is a controlling fifty-percent partner by reason of an interest in capital or profits.

(ii) *Requirements*—(A) The person undertaking the filing obligation must file Form 8865 with that person's income tax return in the manner provided by Form 8865 and the accompanying instructions. The return must contain all of the information that would have been required to be reported by this section if each controlling fifty-percent partner had filed its own Form 8865.

(B) Any controlling fifty-percent partner not filing Form 8865 must file with its income tax return a statement titled "Controlled Foreign Partnership Reporting" containing the following information—

(1) A statement that the person qualified as a controlling fifty-percent partner, but is not submitting Form 8865 pursuant to the multiple controlling fifty-percent partners exception;

(2) The name, address, and taxpayer identification number (if any) of the foreign partnership of which the person qualified as a controlling fifty-percent partner;

(3) A representation that the filing requirement has been or will be satisfied;

(4) The name and address of the person filing the single return;

(5) The Internal Revenue Service Center where the single return is required to be filed; and

(6) Any additional information that Form 8865 and the accompanying instructions require.

(iii) *Penalties.* If the requirements listed in paragraph (c)(1)(ii) of this section are not satisfied, a United States person that did not file a Form 8865 pursuant to this paragraph will be subject to the penalties in paragraph (k) of this section, unless the reasonable cause provision in paragraph (k)(4) of this section is satisfied.

(2) *Certain constructive owners excepted from furnishing information*—(i) *In general.* A United States person that does not own a direct interest in the foreign partnership and that is required to file Form 8865 under this section solely by reason of constructive ownership from a United States person(s) pursuant to paragraph (b)(4) of this section (an indirect partner) is not required to file Form 8865 if all of the requirements listed in paragraph (c)(2)(ii) of this section are met.

(ii) *Requirements*—(A) The United States person(s) whose interest the indirect partner constructively owns reports all the information such person(s) is required to submit under this section, unless such person also is required to file solely by reason of constructive ownership from a United States person(s) pursuant to paragraph (b)(4) of this section, or another person reports the information pursuant to paragraph (c)(1) of this section.

(B) The indirect partner files with its income tax return a statement titled "Controlled Foreign Partnership Reporting" containing the following information—

(1) A representation that the indirect partner was required to file Form 8865, but is not doing so pursuant to the constructive owners exception;

(2) The names and addresses of the United States persons whose interests the indirect partner constructively owns;

(3) The name and address of the foreign partnership with respect to which the indirect partner would have had to have filed Form 8865 but for this exception; and

(4) Any additional information that Form 8865 and the accompanying instructions require.

(iii) *Penalties.* A United States person that pursuant to this paragraph (c)(2) does not file a return will be subject to the penalties in paragraph (k) of this section if the requirements listed in paragraph (c)(2)(ii) of this section are not satisfied, unless such failure is due to reasonable cause, as defined in paragraph (k)(4) of this section.

(iv) *Overlap with multiple controlling fifty-percent partners exception.*—(A) If a United States person qualifies for both the exception in paragraph (c)(1) of this section and the exception in this paragraph (c)(2), such person may only utilize the multiple controlling fifty-percent partners exception in paragraph (c)(1) of this section to avoid filing Form 8865.

(B) *Example.* The following example illustrates the operation of this paragraph (c)(2)(iv):

Example. US is a U.S. citizen. US owns 100% of the stock of DC, a domestic corporation. DC owns a 60% direct interest in FPS, a foreign partnership. DC and US are the only U.S. persons that own interests directly or constructively in FPS. DC owns directly a greater than 50% interest in FPS. US constructively owns DC's interest pursuant to sections 6038(e)(3) and 267(c)(1). Therefore, both DC and US are controlling fifty-percent partners. US qualifies for both the exception in paragraph (c)(1) of this section (multiple controlling fifty-percent partners) and the exception in paragraph (c)(2) of this section (constructive owner exception). US may only utilize the paragraph (c)(1) exception to avoid its filing obligation. Accordingly, DC may file a single Form 8865 on behalf of US and itself. However, that form must contain all the information that would have been submitted had DC and US each submitted a separate Form 8865.

(3) *Members of an affiliated group of corporations filing a consolidated return.* If one or more members of an affiliated group of corporations filing a consolidated return are required under section 6038 to file a Form 8865 for a particular foreign partnership, the common parent corporation may file one Form 8865 on behalf of all of the members of the group required to report under section 6038. Except with respect to group members who also qualify under the exception in paragraph (c)(2) of this section, the Form 8865 must contain all

the information that would have been required to be submitted if each group member were required to file its own Form 8865.

(d) *Exception for certain trusts.* Trusts relating to state and local government employee retirement plans are not required to report under this section, unless the instructions to Form 8865 provide otherwise.

(e) *Reporting under this section not required with respect to partnerships excluded from the application of subchapter K.* The reporting requirements of this section will not apply to any United States person in respect of an eligible partnership as described in §1.761-2(a) if such partnership has validly elected to be excluded from all of the provisions of subchapter K of chapter 1 of the Internal Revenue Code in the manner specified in §1.761-2(b)(2)(i), or such partnership is deemed to have elected to be excluded from all of the provisions of subchapter K of chapter 1 of the Internal Revenue Code in accordance with the provisions of §1.761-2(b)(2)(ii).

(f) *Period covered by return.* The information required under this section must be furnished for the tax year of the foreign partnership ending with or within the United States person's tax year. See section 706 for rules regarding tax years of partnerships.

(g) *Contents of return.*—(1) *Information required to be submitted by controlling fifty-percent partners and controlling ten-percent partners.* All controlling fifty-percent partners and all controlling ten-percent partners must submit the following information on Form 8865 in the form and manner and to the extent prescribed by Form 8865 and its instructions—

(i) A statement of the income, gain, losses, deductions and credits allocated to the direct interest in the partnership of the person reporting under section 6038;

(ii) A list of all partnerships (foreign or domestic) in which the foreign partnership owned a direct interest, or owned a constructive interest of ten percent or more under the rules of section 267(c)(1) or (5), during the partnership's tax year for which the Form 8865 is being filed;

(iii) Information about all foreign entities that were disregarded as entities separate from their owner under §§ 301.7701-2 and 301.7701-3 that were owned by the foreign partnership during the partnership's tax year for which the Form 8865 is being filed;

(iv) A summary of the transactions that took place during the partnership's tax year between the partnership and the person filing the return, between the partnership and any other partnership of which the person filing the return is a controlling fifty-percent partner, and between the partnership and any corporation controlled (under section 6038(e)(2) and the regulations thereunder) by the person filing the return; and

(v) Any other information that Form 8865 or its accompanying instructions require to be submitted.

(2) *Additional information required to be submitted by controlling fifty-percent partners.* In addition to the information required pursuant to paragraph (g)(1) of this section, controlling fifty-percent partners must also submit the following information in the form and manner and to the extent required by Form 8865 and its instructions—

(i) A list of the names, addresses and tax identification numbers (if any) of each United States person that owned a direct interest of ten percent or more in the partnership during the partnership's tax year, and of each United States and foreign person whose interests in the partnership the controlling fifty-percent partner constructively owned under paragraph (b)(4) of this section during the partnership's tax year;

(ii) A list of transactions between the partnership and any United States person owning at the time of the transaction at least a 10-percent direct interest (as defined in paragraph (b)(3) of this section) in the foreign partnership;

(iii) A statement of the aggregate of the partners' distributive shares of items of income, gain, losses, deductions and credits;

(iv) A statement of income, gain, losses, deductions and credits allocated to each United States person holding a direct interest in the foreign partnership of ten percent or more; and

(v) Any other information Form 8865 or its accompanying instructions require controlling fifty-percent partners to submit.

(h) *Method of reporting.* Except as otherwise provided on Form 8865 or the accompanying instructions, all amounts required to be furnished on Form 8865 must be expressed in United States dollars. All statements required on or with Form 8865 pursuant to this section must be in English.

(i) *Time and place for filing return*—(1) *In general.* Form 8865 must be filed with the United States person's income tax return on or before the due date (including extensions) of that return. If the United States person is not required to file an income tax return for its tax year with which or within which the foreign partnership's tax year ends, but is required to file an information return for that year (for example, Form 1065, "U.S. Partnership Return of Income," or Form 990, "Return of Organization Exempt from Income Tax"), the Form 8865 must be filed with the United States person's information return filed on or before the due date (including extensions) of that return.

(2) *Duplicate return.* If required by the instructions to Form 8865, a duplicate Form 8865 (including attachments and schedules) must also be filed.

(j) *Overlap with section 6031*—(1) *In general.* A partner may be required to file Form 8865 under this section and the foreign partnership in which it is a partner may also be required to file a Form 1065 under section 6031(e) for the same partnership tax year. However, if a foreign partnership completes and files Form 1065, the United States partner must use a copy of the relevant parts of Form 1065 to fulfill certain of its filing obligations under section 6038. Specifically, instead of completing the Form 8865 schedules that the person would otherwise be required to complete as a controlling fifty-percent or a controlling ten-percent partner, the person must instead attach to its Form 8865 copies of the relevant schedules from Form 1065 that the instructions to Form 8865 state are considered equivalent to schedules on Form 8865. Should a schedule on Form 8865 ask for information that is not required to be reported on the equivalent Form 1065

schedule, the partner is not required to report that information on its Form 8865 if a copy of the completed equivalent Form 1065 schedule is attached to its Form 8865. A person attaching copies of schedules from Form 1065 to its Form 8865 must still complete the parts of Form 8865 that the person is required to complete as a controlling fifty-percent partner, or a controlling ten-percent partner, and for which there is no equivalent Form 1065 schedule (for example, the first page of Form 8865).

(2) *Example.* The following example illustrates the application of this paragraph (j):

Example. US, a United States citizen, owns a 55% interest in FPS, a foreign partnership and calendar year taxpayer. Because US owns more than a 50% interest in FPS, US is a controlling fifty-percent partner of FPS and must file a Form 8865 with respect to FPS. During 2001, FPS earns gross income that is effectively connected with the conduct of a trade or business within the United States. Therefore, pursuant to section 6031(e)(2)(B), FPS must file Form 1065 for its 2001 tax year. If FPS completes and files Form 1065, US must use copies of the relevant schedules from Form 1065 to complete US's Form 8865 for FPS's 2001 tax year. If FPS instead had a September 30 tax year pursuant to section 706, then US must attach to its Form 1040 for US's 2001 tax year a Form 8865 completed with respect to FPS's tax year ending September 30, 2001. If FPS filed a Form 1065 for its tax year ending September 30, 2001, then US must use that Form 1065 to fulfill in part its reporting obligations under section 6038 by attaching the relevant schedules from the Form 1065 to US's Form 8865.

(k) *Failure to comply with reporting requirement—(1) In general.* Any United States person required to file Form 8865 under Section 6038 and this section that fails to comply (as defined in paragraph (k)(2) of this section) with the reporting requirements of this section, will be subject to the penalties described in paragraph (k)(3) of this section.

(2) *Failure to comply.* A failure to comply is separately determined for each foreign partnership for which a United States person has a section 6038 reporting obligation. A failure to comply with the requirements of section 6038 includes the following—

(i) The failure to report at the proper time and in the proper manner any in-

formation required to be reported under the rules of this section; or

(ii) The provision of false or inaccurate information in purported compliance with the requirements of this section.

(3) *Penalties.* A United States person that fails to comply (as defined in paragraph (k)(2) of this section) with the reporting requirements of this section must pay the following penalties, subject to the reasonable cause exception in paragraph (k)(4) of this section:

(i) *Dollar amount penalty—(A) \$10,000 penalty.* A penalty of \$10,000 shall be imposed for each tax year of each foreign partnership with respect to which a failure to comply occurs.

(B) *Increase in penalty.* If a failure to comply with the applicable reporting requirements of section 6038 and this section continues for more than 90 days after the date on which the Commissioner or the Commissioner's delegate mails notice of the failure to the United States person required to file Form 8865, the person must pay an additional penalty of \$10,000 for each 30-day period (or fraction thereof) during which the failure continues after the 90-day period has expired.

(C) *Limitation.* The additional penalty imposed on any United States person by section 6038(b)(2) and paragraph (k)(3)(i)(B) of this section is limited to a maximum of \$50,000 for each partnership for each tax year with respect to which the failure occurs.

(ii) *Penalty of reducing foreign tax credit—(A) Effect on foreign tax credit.*

Failure to comply with the reporting requirements of section 6038 and this section may cause a reduction of foreign tax credits under section 901 (taxes of foreign countries and of possessions of the United States). In applying section 901 to a United States person for any tax year with or within which its foreign partnership's tax year ended, the amount of taxes paid (and deemed paid under sections 902 and 960) by the United States person will be reduced by 10 percent if the person fails to comply. However, no tax deemed paid under section 904(c) will be reduced under the provisions of this paragraph (k)(3)(ii).

(B) *Reduction for continued failure.* If a failure to comply with the reporting

requirements of section 6038 and this section continues for more than 90 days after the date on which the Commissioner or the Commissioner's delegate mails notice of the failure to the person required to file Form 8865, then the amount of the reduction in paragraph (k)(3)(ii)(A) of this section will be 10 percent, plus an additional 5 percent for each 3-month period (or fraction thereof) during which the failure continues after the 90-day period has expired.

(C) *Limitation on reduction.* The amount of the reduction under paragraphs (k)(3)(ii)(A) and (B) of this section for each failure to furnish information required under this section will not exceed the greater of \$10,000, or the gross income of the foreign partnership for its tax year with respect to which the failure occurred.

(D) *Offset for dollar amount penalty imposed.* The total amount of the reduction which, but for this paragraph (k)(3)(ii)(D), may be made under this paragraph (k)(3)(ii) with respect to any separate failure, may not exceed the maximum amount of the reductions that may be imposed, reduced (but not below zero) by the dollar amount penalty imposed by paragraph (k)(3)(i) of this section with respect to the failure.

(4) *Reasonable cause limitation.* The time prescribed for filing a complete Form 8865, and the beginning of the 90-day period after the Commissioner or the Commissioner's delegate mails notice under paragraphs (k)(3)(i)(B) and (ii)(B) of this section, will be treated as being not earlier than the last day on which reasonable cause existed for failure to furnish the information. The United States person may show reasonable cause by providing a written statement to the Commissioner's delegate having jurisdiction over the person's return to which the Form 8865 should have been attached, setting forth the reasons for the failure to comply. Whether a failure to comply was due to reasonable cause will be determined by the Commissioner, or the Commissioner's delegate, under all the facts and circumstances.

(5) *Statute of limitations.* For exceptions to the limitations on assessment in the event of a failure to provide in-

formation under section 6038, see section 6501(c)(8).

(1) *Effective date.* This section applies to tax years of a foreign partnership ending on or after December 31, 2000.

[T.D. 8850, 64 FR 72550, Dec. 28, 1999]

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